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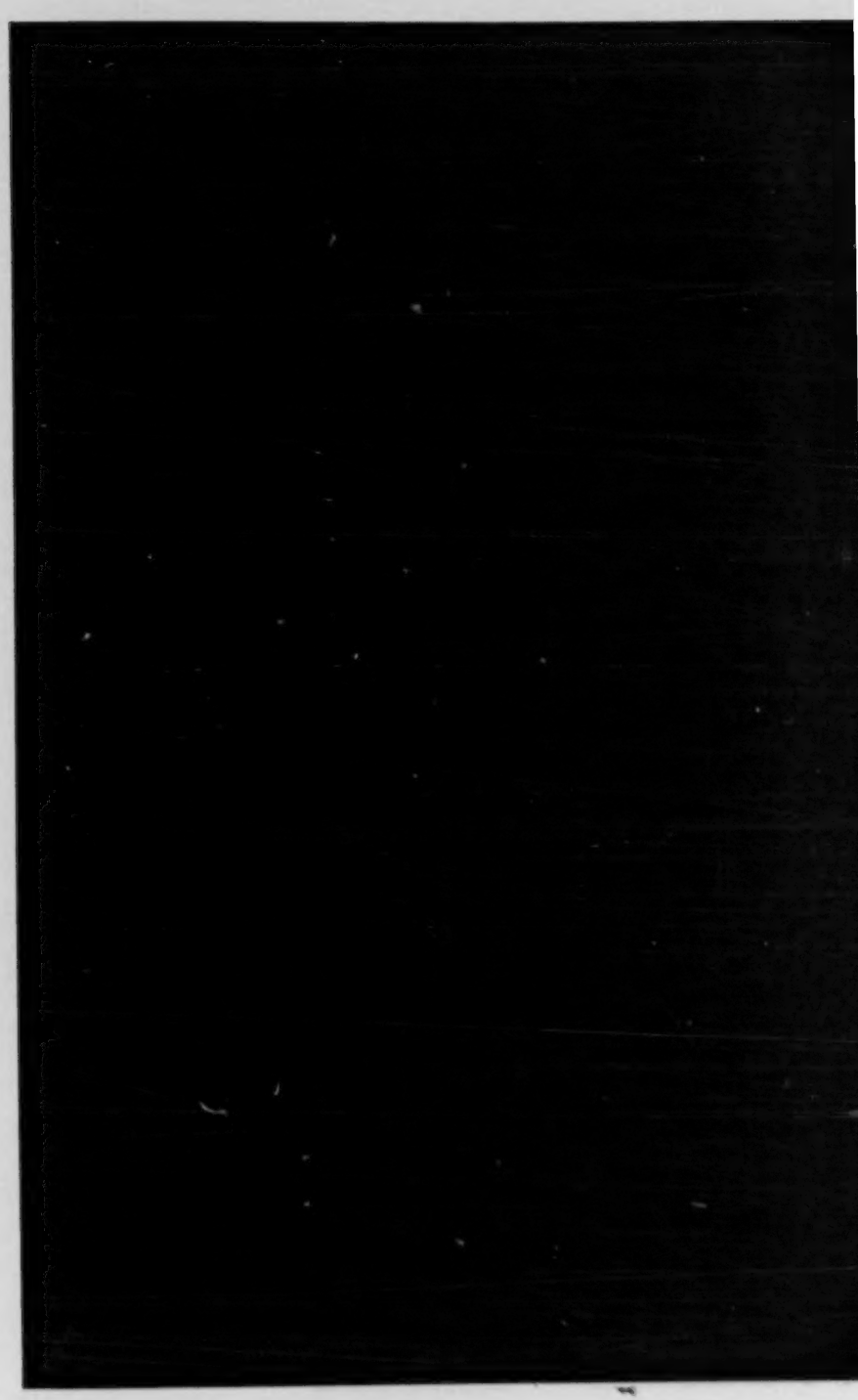

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 549

JOHN A. HANNAH, ET AL., APPELLANTS

v.

MARGARET M. LARCHE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

No. 550

JOHN A. HANNAH, ET AL., PETITIONERS

v.

J. A. H. SLAWSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE APPELLANTS IN NO. 549 AND THE PETITIONERS IN NO. 550

OPINIONS BELOW

The separate opinions of the United States District Court for the Western District of Louisiana (L. 244;

S. 29)[1] are not yet reported.[2] A prior opinion of the district court, granting appellees' and respondents' application for a temporary restraining order, is reported at 176 F. Supp. 791 (L. 74).

JURISDICTION

The judgments of the district court were entered on November 9, 1959 (L. 271; S. 30). In No. 549, notice of appeal to this Court was filed on November 12, 1959 (L. 272). The jurisdictional statement in No. 549 was filed on November 27, 1959. The jurisdiction of this Court over the appeal rests on 28 U.S.C. 1253.

In No. 550, notice of appeal to the Court of Appeals for the Fifth Circuit was filed on November 19, 1959, and the record was docketed in that court on November 20, 1959 (S. 32B, 35). The case has not been heard or decided by the court of appeals. The petition for a writ of certiorari prior to judgment was filed on November 27, 1959. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED[3]

The Civil Rights Act of 1957 directs the Commission on Civil Rights to "investigate allegations in writing under oath or affirmation that certain citi-

[1] References to the record in No. 549 (the *Larche* case) will be designated "L.", and in No. 550 (the *Slawson* case), "S."

[2] The opinion of the district court in *Slawson*, No. 550, incorporates by reference the opinion of the three-judge district court in *Larche*, No. 549 (S. 29).

[3] The issue presented in both cases is identical except for the fact that in *Slawson*, No. 550, the plaintiffs were private individuals rather than voting registrars.

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zens of the United States are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin * * *."

The question presented is whether the district court erred in enjoining the Commission from holding a scheduled hearing under the Act, where it appeared that (a) the plaintiffs[4] are voting registrars or citizens who were subpoenaed to appear as witnesses at the hearing; (b) the Commission, considering all complaints submitted to it as confidential, denied plaintiffs' request, in advance of the hearing, for the names of persons making allegations against them and the contents of such allegations; and (c) the Commission's rules of procedure governing hearings provide that interrogation of witnesses shall be conducted only by members of the Commission or its staff.

STATUTORY PROVISIONS AND RULES INVOLVED

The Civil Rights Act of 1957 (71 Stat. 634, 42 U.S.C. 1975, *et seq.*) provides:

> Sec. 101 [42 U.S.C. 1975]. COMMISSION ON CIVIL RIGHTS.
>
> (a) *Establishment.*
>
> There is created in the executive branch of the Government a Commission on Civil Rights (hereinafter called the "Commission").
>
> * * * * *
>
> Sec. 102 [42 U.S.C. 1975a]. RULES OF PROCEDURE.
>
> (a) *Opening statement.*

[4] Throughout this brief, appellees in No. 549 and respondents in No. 550 will generally be referred to as "the plaintiffs."

The Chairman or one designated by him to act as Chairman at a hearing of the Commission shall announce in an opening statement the subject of the hearing.

(b) *Copy of rules.*

A copy of the Commission's rules shall be made available to the witness before the Commission.

(c) *Attendance of counsel.*

Witnesses at the hearings may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights.

(d) *Censure and exclusion of counsel.*

The Chairman or Acting Chairman may punish breaches of order and decorum and unprofessional ethics on the part of counsel, by censure and exclusion from the hearings.

(e) *Defamatory, degrading, or incriminating evidence.*

If the Commission determines that evidence or testimony at any hearing may tend to defame, degrade, or incriminate any person, it shall (1) receive such evidence or testimony in executive session; (2) afford such person an opportunity voluntarily to appear as a witness; and (3) receive and dispose of requests from such person to subpena additional witnesses.

(f) *Requests for additional witnesses.*

Except as provided in this section and section 1975(f) of this title, the Chairman shall receive and the Commission shall dispose of requests to subpena additional witnesses.

(g) *Release of evidence taken in executive session.*

No evidence or testimony taken in executive session may be released or used in public ses-

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sions without the consent of the Commission. Whoever releases or uses in public without the consent of the Commission evidence or testimony taken in executive session shall be fined not more than $1,000, or imprisoned for not more than one year.

(h) *Submission of written statements.*

In the discretion of the Commission, witnesses may submit brief and pertinent sworn statements in writing for inclusion in the record. The Commission is the sole judge of the pertinency of testimony and evidence adduced at its hearings.

(i) *Transcripts.*

Upon payment of the cost thereof, a witness may obtain a transcript copy of his testimony given at a public session or, if given at an executive session, when authorized by the Commission.

(j) *Witness fees.*

A witness attending any session of the Commission shall receive $4 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 8 cents per mile for going from and returning to his place of residence. Witnesses who attend at points so far removed from their respective residences as to prohibit return thereto from day to day shall be entitled to an additional allowance of $12 per day for expenses of subsistence, including the time necessarily occupied in going to and returning from the place of attendance. Mileage payments shall be tendered to the witness upon service of a subpena issued on behalf of the Commission or any subcommittee thereof.

(k) *Restriction on issuance of subpena.*
The Commission shall not issue any subpena for the attendance and testimony of witnesses or for the production of written or other matter which would require the presence of the party subpenaed at a hearing to be held outside of the State, wherein the witness is found or resides or transacts business.

* * * * *

SEC. 104 [42 U.S.C. 1975c]. DUTIES; REPORTS; TERMINATION.

(a) The Commission shall—

(1) investigate allegations in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin; which writing, under oath or affirmation, shall set forth the facts upon which such belief or beliefs are based;

(2) study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution; and

(3) appraise the laws and policies of the Federal Government with respect to equal protection of the laws under the Constitution.

(b) The Commission shall submit interim reports to the President and to the Congress at such times as either the Commission or the President shall deem desirable, and shall submit to the President and to the Congress a final and comprehensive report of its activities, findings, and recommendations not later than two years from September 9, 1957.

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(c) Sixty days after the submission of its final report and recommendations the Commission shall cease to exist.

SEC. 105 [42 U.S.C. 1975d]. POWERS.

* * * * *

(f) *Hearings; issuance of subpenas.*

The Commission, or on the authorization of the Commission any subcommittee of two or more members, a least one of whom shall be of each major political party, may, for the purpose of carrying out the provisions of this Act, hold such hearings and act at such times and places as the Commission or such authorized subcommittee may deem advisable. Subpenas for the attendance and testimony of witnesses or the production of written or other matter may be issued in accordance with the rules of the Commission as contained in section 1975a (j) and (k) of this title, over the signature of the Chairman of the Commission or of such subcommittee, and may be served by any person designated by such Chairman.

(g) *Aid of courts in enforcing subpenas.*

In case of contumacy or refusal to obey a subpena, any district court of the United States or the United States court of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Attorney General of the United States shall have jurisdiction to issue to such person an order requiring such person to appear

before the Commission or a subcommittee thereof, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

The Rules of Procedure, adopted on July 1, 1958, by the Commission on Civil Rights, in pertinent part provide:

3. * * *

(f) An accurate transcript shall be made of the testimony of all witnesses in all hearings, either public or executive sessions, of the Commission or of any subcommittee thereof. Each witness shall have the right to inspect the record of his own testimony. A transcript copy of his testimony may be purchased by a witness pursuant to Rule 2(i) above. Transcript copies of public sessions may be obtained by the public upon payment of the cost thereof.

(g) Any witness desiring to read a prepared statement in a hearing shall file a copy with the Commission or subcommittee 24 hours in advance. The Commission or subcommittee shall decide whether to permit the reading of such statement.

(h) The Commission or subcommittee shall decide whether written statements or documents submitted to it shall be placed in the record of the hearing.

(i) Interrogation of witnesses at hearings shall be conducted only by members of the Commission or by authorized staff personnel.

(j) If the Commission pursuant to Rule 2(e), or any subcommittee thereof, determines that evidence or testimony at any hearing may

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tend to defame, degrade, or incriminate any person, it shall advise such person that such evidence has been given and it shall afford such person an opportunity to read the pertinent testimony and to appear as a voluntary witness or to file a sworn statement in his behalf.

STATEMENT

The facts of these two cases are not in dispute, and are based upon the stipulations of the parties and uncontradicted pleadings and affidavits filed in the district court.

On January 23, 1959, Jack P. F. Gremillion, the Attorney General of Louisiana, sent a letter to each registrar of voters in Louisiana stating that (1) he had advised Gordon M. Tiffany, the Staff Director of the Commission on Civil Rights, that Louisiana law made the State Attorney General the legal adviser for all registrars in any hearing or investigation before a federal commission, and that (2) Mr. Tiffany had assured Mr. Gremillion that the latter would be informed prior to the investigation or questioning of any registrar (Pl. Ex. A, L. 146).

On March 12, 1959, Col. A. H. Rosenfeld, Jr., a member of the Commission's staff, interviewed Mrs. Lannie Linton,[8] registrar of voters for Claiborne Parish (Affidavit of Mr. Gremillion, L. 143). On March 14, 1959, Mrs. Linton's personal attorney, W. M. Shaw, wrote to Mr. Tiffany, asserting that Col. Rosenfeld had stated at the interview that the Commission had on file four sworn statements charging Mrs. Linton with depriving citizens in Claiborne

[8] Mrs. Linton is one of the plaintiffs in No. 549 (L. 1).

Parish of their voting rights by reason of color, race, religion or national origin; that Mrs. Linton knew these allegations to be false; and that she wished to prefer charges of perjury against the affiants. Demand was made upon the Commission to forward copies of the affidavits so that they could be presented to a grand jury (Pl. Ex. C, L. 148). Further interviews were conducted by Col. Rosenfeld with registrars for the Parishes of Caddo and Webster (Affidavit of Mr. Gremillion, L. 143).

On April 14, 1959, Mr. Tiffany, replying to Mr. Shaw's letter of March 14, stated that the Commission, at a meeting held April 10, 1959, had considered and denied Mr. Shaw's request for copies of affidavits filed with the Commission, and that the Commission had issued the following statement (Pl. Ex. G, L. 150):

> The Commission from its first meeting forward, having considered all complaints submitted to it as confidential because such confidentiality is essential in carrying out the statutory duties of the Commission, the Staff Director is hereby instructed not to disclose the names of complainants or other information contained in complaints to anyone except members of the Commission and members of the staff assigned to process, study, or investigate such complaints.

A copy of this letter was sent to Mr. Gremillion (Pl. Ex. F, L. 150).

On May 13, 1959, Mr. Tiffany wrote to Mr. Gremillion, asserting that the Commission had authorized the former to prepare and forward interrogatories to

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Mr. Gremillion (Pl. Ex. M, L. 157). The interrogatories were enclosed (Pl. Ex. M, L. 157–158). Mr. Gremillion replied on May 28, asserting that the registrars of voters in the parishes involved had been furnished the interrogatories, and had instructed Mr. Gremillion to advise the Commission that the interrogatories would not be answered because, *inter alia*, they were not accompanied by specific complaints or the names of the complainants (Pl. Ex. N, L. 158–159).

On May 29, Mr. Tiffany replied, by telegram, that the interrogatories covered specific allegations received by the Commission, but that it had not agreed to furnish those allegations or any information which would disclose the identity of the affiants. He requested that the completed interrogatories be received in the Commission's office by June 5 (Pl. Ex. O, L. 161–162). A letter from Mr. Tiffany to Mr. Gremillion, also dated May 29, 1959, confirmed the telegram (Pl. Ex. P, L. 162).[6]

---

[6] The record also contains an exchange of letters in May 1959, between Mr. W. Wilson White, then Assistant Attorney General in charge of the Department of Justice's Civil Rights Division, and Mr. Gremillion, concerning a request, made by the Department in December 1958, for permission to inspect the registration records in Webster Parish in connection with an investigation by the Department of alleged violations of laws within the Department's jurisdiction relating to discrimination against voters (Pl. Ex. H and I, L. 151). Mr. Tiffany, who had been sent a copy of Mr. Gremillion's letter to Mr. White, wrote to the former on May 18, 1959, that there is no connection between the Commission and the Department; that they operate under different authorizations of law; and that the Commission "has from its inception been only a fact-finding body * * *." (Pl. Ex. J, L. 155).

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On June 2, 1959, Mr. Gremillion wrote to Mr. Tiffany, requesting reconsideration of his letter of May 28, 1959, and repeating his assertion that the registrars should be furnished with the nature and source of the complaints (Pl. Ex. Q, L. 163). On June 4, 1959, Mr. Tiffany stated in reply that the matter of the interrogatories would be placed before the Commission at its next meeting (Pl. Ex. R, L. 164). By letter dated June 11, 1959, Mr. Tiffany advised Mr. Gremillion that "the Commission, at its official meeting held here yestereday, June 10, 1959, authorized a hearing on Louisiana voting complaints pursuant to Sec. 105(f) of the Civil Rights Act of 1957, 71 Stat. 634. The hearing is scheduled to be held on July 13, 1959 in Shreveport, Louisiana" (Pl. Ex. S, L. 164–165).

Subsequently, between June 29 and July 6, subpoenas *duces tecum* were served on the plaintiffs in No. 549, who were voting registrars for certain parishes in Louisiana, to appear at this hearing and to bring to the hearing various voting and registration records within their custody and control (L. 4, 16–18). During approximately the same period of time, subpoenas were served on the plaintiffs in No. 550, who were private citizens, to appear at the same hearing (S. 23). On July 8, 1959, Mr. Tiffany wrote to Mr. Gremillion, enclosing copies of the Civil Rights Act and of the Commission's Rules of Procedure, and drawing Mr. Gremillion's attention to Section 102(h) of the Act, which permits witnesses to submit, subject to the discretion of the Commission, briefs and pertinent sworn statements for inclusion in the record (Pl. Ex. T, L. 165).

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On July 10, 1959, the plaintiffs filed two separate complaints under 28 U.S.C. 1331 [7] in the District Court for the Western District of Louisiana seeking to enjoin the members of the Commission from holding the hearing scheduled for July 13 in Shreveport (L. 3, S. 1). Both complaints alleged that the Commission was acting illegally in refusing to furnish the names of persons making allegations against the plaintiffs and the contents of their allegations, and in refusing to allow them to confront and cross-examine the persons making such allegations (L. 5–11; S. 4–5). In addition, the complaint in *Larche* alleged that the Act creating the Commission did not constitute "appropriate legislation within the meaning of Section (2) of the XV Amendment" (L. 4).[8] Both complaints sought a temporary restraining order, and a preliminary and permanent injunction (L. 4; S. 6–7).[9] On

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[7] The complaints in *Larche* also asserted as bases for jurisdiction, 28 U.S.C. 1332, 28 U.S.C. 2282, 28 U.S.C. 2284, and 42 U.S.C. 1985 (L. 3); the complaint in *Slawson* also cited 42 U.S.C. 1985 (S. 1).

[8] The complaint in *Larche* also urged (1) that Louisiana law imposes limitations upon who may inspect public records, and that appellants did not qualify for such inspection (L. 6); (2) that Louisiana law prohibited the registrars from removing the records "except upon an order of a competent court", and that the Commission was not a "competent court" (L. 6); (3) that obedience to the subpoenas of the Commission would cause appellees irreparable damage, in that they would be forced to violate Louisiana law (L. 7); and (4) that compliance with the subpoenas would necessitate the closing of the offices of the registrars during the hearing, a result which neither Congress nor the Commission allegedly had power to bring about (L. 9).

[9] The complaint in *Larche* also sought a declaratory judgment that the Civil Rights Act of 1957 was unconstitutional (L. 3–4).

the same day that the complaints were filed, the district court (Dawkins, J.) held a combined hearing on the prayers for temporary restraining orders, and on July 12 issued temporary restraining orders and rules to show cause why a preliminary injunction should not be issued (L. 87–89; S. 14). The Commission subsequently filed answers stating that the complaints failed to state a claim upon which relief could be granted and that plaintiffs had not suffered legal injury (L. 138; S. 20).[10]

Inasmuch as the complaint in *Larche* sought an injunction restraining the operation of an Act of Congress as in violation of the Constitution, a three-judge court was convened pursuant to 28 U.S.C. 2282 (L. 122). But since plaintiffs in *Slawson* did not challenge the constitutionality of the Civil Rights Act of 1957, that case was heard by Judge Dawkins alone. As Judge Dawkins was also a member of the three-judge court, a combined hearing was had on both cases on August 7, 1959 (L. 187).

At the oral argument in the district court, Government counsel indicated that the Commission, on previous occasions, has permitted questioning from those present at its open hearings and conferences (L. 211). A stipulation was introduced in *Larche* [11] showing that

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[10] The Commission also filed a motion for summary judgment in *Slawson* which was not acted upon (S. 18). The three-judge court in its opinion in *Larche*, however, dismissed this motion which had been made only in *Slawson* (L. 261).

[11] A stipulation was also filed in *Slawson* reciting that the stipulation in *Larche* "shall be considered for all purposes as having been entered into between counsel in this suit insofar as it is relevant and material thereto" (S. 23). The complaint in *Slawson* also stated: "Complainants have been further informed

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the Commission had received 67 complaints that certain citizens in Louisiana had been deprived of the right to vote on account of race, color, religion or national origin; that a number of these complaints alleged generally that the plaintiffs had caused such deprivations; that the Commission, on June 10, 1959, authorized a hearing on Louisiana voting complaints to be held in Shreveport, Louisiana, on July 13, 1959; and that the Commission duly issued subpoenas and caused them to be served on plaintiffs in connection with the hearing (L. 169–170). Six plaintiffs introduced affidavits which stated that they would be irreparably injured if they were required to testify at the proposed Commission hearing (L. 166–167; see S. 23–24).

In an opinion filed on October 7, 1959, the three-judge court held in *Larche* that the Civil Rights Act of 1957 was an appropriate exercise of legislative power under the Fourteenth and Fifteenth Amendments and under Article I of the Constitution (L. 247–250). The court concluded, however, with Circuit Judge Wisdom dissenting (L. 261), that the Commission's rules and procedures were not authorized by Congress and were invalid (L. 250–258). On November 9, 1959, the court entered an order enjoining the Commission from holding any hearings in the Western District of Louisiana in which the "registrars, accused of depriving others of the right to vote, would

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and believe that such written allegations are in the nature of charges against your complainants which, if true, would constitute ground for criminal and civil proceedings against them" (S. 3).

be denied the right of apprisal, confrontation and cross-examination" (L. 271).[12] On November 9, 1959, Judge Dawkins also filed an opinion in *Slawson,* incorporating by reference the opinion filed in *Larche* (S. 30),[13] and entered an injunction identical with that entered in *Larche* (except that "plaintiffs" was substituted for "registrars") (S. 30).

SUMMARY OF ARGUMENT

The district court has held that the rules of the Civil Rights Commission, insofar as they deny witnesses, in advance of a hearing, the right to know the contents and sources of allegations against them, and, at the hearing, the rights of confrontation and cross-examination, present a serious constitutional question; and that, in view of *Greene* v. *McElroy,* 360 U.S. 474, such rules must be based on explicit authorization by Congress. The court found that the Civil Rights Act of 1957 did not explicitly authorize the Civil Rights Commission to adopt such procedures. The court concluded, therefore, that the Commission would exceed its powers by holding any hearings at

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[12] The court's opinion does not specify whether the injunction is permanent or interlocutory. Judge Dawkins, however, in issuing the temporary restraining order in *Larche*, entered a rule to show cause why a preliminary injunction should not be issued (L. 125). Argument was thereupon made to the three-judge court. Because the opinion of the three-judge court decides the merits of the case, and because the order of the three-judge court is unrestricted in terms, it would appear that the order is a permanent injunction. Whether the order is final or interlocutory, however, it is appealable to this Court under 28 U.S.C. 1253.

[13] The opinion recites that a preliminary injunction is being issued (S. 29).

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which these procedures were followed, and it accordingly enjoined the holding of the Commission's scheduled hearing.

The district court's reliance upon *Greene* was entirely misplaced. First, Congress clearly authorized the Commission's rules of procedure which are here challenged. And second, this case (unlike *Greene*) does not involve an "area of questionable constitutionality" (360 U.S. at 506). The Commission was conducting an investigation, not a trial. Its purpose was to obtain facts for submission to Congress and the President; it was not inquiring into, or determining, the guilt or innocence of particular individuals.

I

After full consideration, Congress deliberately rejected proposals that witnesses before the Commission should be given (1) advance notice of the contents of allegations made against them, (2) the opportunity to inspect such materials in the Commission's files, and (3) the right to confront and cross-examine persons making allegations against them. Instead, Congress specifically incorporated into the Civil Rights Act of 1957 the so-called "fair play" rules applicable to the investigating committees of the House of Representatives. These rules give witnesses extensive procedural protections but do not provide for notice, confrontation, or cross-examination.

II

No serious constitutional question is involved.

A. The Commission, by the terms of the Civil Rights Act of 1957 (Section 104), has the authority only to "investigate allegations," "study and collect informa-

tion," "appraise the laws and policies of the Federal Government," and submit reports to the President and Congress. It functions solely as an investigative arm of the legislative and executive branches of the government. It is not an adjudicatory body. It has no power to decide, to determine rights or obligations, to impose sanctions, to indict, to punish, or to deprive any person of life, liberty, or property.

B. No court has ever held that an investigative body is constitutionally obliged to follow the procedures which the district court imposed on the Commission on Civil Rights. Instead, all judicial precedent holds to the contrary: that notice, confrontation, and cross-examination need not be provided by bodies which possess power only to investigate. And even in a federal criminal case, the defendant has only a limited right of pre-trial discovery and is not entitled to obtain, in advance of the trial, disclosure of the identity of informants and to receive copies of statements given by them to the government. And, of course, even in a criminal case, a defendant could not secure an injunction against the trial by showing that his rights to confrontation and cross-examination would not be respected.

Long-standing historical practice of investigatory bodies validates the Commission's procedures. In proceedings before investigatory tribunals of all sorts—grand juries, legislative committees, and executive fact-finding agencies—neither pre-hearing notice, confrontation, nor cross-examination has ever been regarded as constitutionally required. Generally speaking, investigating bodies have not followed ju-

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dicial trial procedures. And on such occasions as these rights have been afforded, it was as a matter of grace, not right.

ARGUMENT

INTRODUCTION

One of the most important functions which Congress, in the Civil Rights Act of 1957, assigned to the Commission on Civil Rights is the investigation of allegations in writing that certain citizens of the United States are being deprived of the right to vote because of their color, race, religion, or national origin. For the purpose of carrying out the provisions of the Act, Congress authorized the Commission to hold hearings, and to issue subpoenas for the attendance and testimony of witnesses and the production of written or other matter, in accordance with rules promulgated by the Commission. The statute itself expressly prescribes rules of procedure to be followed by the Commission at its hearings, and the Commission has also promulgated various implementing rules.

Under the Commission's rules and procedures, a witness subpoenaed to appear at a scheduled hearing of the Commission is not entitled, in advance of the hearing, to be informed of the names of persons making the allegations being investigated and the contents of such allegations; nor is the witness entitled at the hearing to direct confrontation and cross-examination of such persons (except, of course, that he is confronted by those affiants who appear as witnesses at the hearing).

The Act provides that witnesses at hearings may

be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights (Sec. 102(c)). It also provides that "If the Commission determines that evidence or testimony at any hearing may tend to defame, degrade, or incriminate any person, it shall (1) receive such evidence or testimony in executive session; (2) afford such person an opportunity voluntarily to appear as a witness; and (3) receive and dispose of requests from such person to subpoena additional witnesses" (Sec. 102(e)). The Commission's implementing rules provide that "Interrogation of witnesses at hearings shall be conducted only by members of the Commission or by authorized staff personnel" (Sec. 3(i)) and that "If the Commission * * * determines that evidence or testimony at any hearing may tend to defame, degrade, or incriminate any person, it shall advise such person that such evidence has been given and it shall afford such person an opportunity to read the pertinent testimony and to appear as a voluntary witness or to file a sworn statement in his behalf" (Sec. 3(j)).

In the instant cases the district court held that these basic provisions of the Commission's procedures are unauthorized and invalid: that there is "nothing in the Act which expressly authorizes or permits the Commission's refusal to inform persons, under investigation for criminal conduct, of the nature, cause and source of the accusations against them, and there is nothing in the Act authorizing the Commission to deprive these persons of the right of confrontation and cross-examination" (L. 251–252); and that, since the procedures and rules of the Commission are *ultra*

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vires, the proper judicial relief is to enjoin the Commission from holding the hearing (L. 261).

We submit that the rulings below are manifestly erroneous. In Point I, we shall show that the procedures followed by the Commission on Civil Rights, so far as pertinent, were clearly authorized by Congress, as the provisions and the legislative history of the Act unmistakably demonstrate. We believe that, as to the Commission's procedures here, there exists explicit authorization by Congress of the character which the Court found to be lacking in *Greene* v. *McElroy*, 360 U.S. 474. At all events, the problem here is not analogous to that in the *Greene* case, because—as we shall show in Point II—there is no serious constitutional question since the Commission was conducting an investigation, not a trial.

I

CONGRESS CLEARLY AUTHORIZED THE COMMISSION'S PROCEDURES

Congress devoted considerable attention to the question of the procedures which should be followed by the Commission, and it deliberately rejected the proposal that the Commission should be required to give witnesses at its hearings the right to be furnished with advance notice of the names of persons making allegations against them or the content of such allegations, or the right to confrontation and cross-examination such as are afforded defendants in a criminal trial.

A. Section 102 of the Act (*supra*, pp. 3–6) establishes a detailed set of procedures to be followed by

the Commission at its hearings[14] and, in so doing, guarantees to witnesses important rights. It provides that:

(1) the Commission must begin its hearings with an opening statement by the chairman announcing the subject of the hearing;

(2) witnesses must be provided with a copy of the rules of the Commission;

(3) witnesses may have their own counsel present for the purpose of advising them concerning their constitutional rights;

(4) the Commission shall receive evidence in executive session, where such evidence may tend to defame, degrade, or incriminate any person;

(5) witnesses may request the subpoenaing of additional witnesses;

(6) witnesses may submit sworn statements for inclusion in the record in the discretion of the Commission.

This precise and detailed catalogue of procedural rights shows on its face the deep concern of Congress with this problem. This is confirmed by the Act's legislative history.

When the 1956 civil rights bill (H.R. 627) was reported out by the House Judiciary Committee, it had no procedural provisions regulating the hearings of the proposed Commission. H. Rept. No. 2187, 84th Cong., 2d Sess. During debate on the floor, Representative Dies of Texas proposed certain

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[14] In contrast, Congress has generally not provided such detailed mandatory rules for investigatory commissions (see *infra*, pp. 54–56).

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amendments designed to add procedural safeguards (102 Cong. Rec. 13542), and his proposals were written into the bill before it passed the House (102 Cong. Rec. 13998–13999). The bill, however, died in the Senate.

The Dies amendments (see Appendix, *infra*, pp. 63–65) would have specifically provided that (1) "[i]nsofar as practicable, any person whose activities are the subject of investigation by the Commission, or about whom adverse information is proposed to be presented at a public hearing * * * shall be fully advised by the Commission as to the matters into which the Commission proposes to inquire and the adverse material which is proposed to be presented" (Section 101(r)); that (2) "[i]f a person is adversely affected by evidence or testimony given in a public hearing, that person shall have the right: * * * (ii) to have the adverse witness recalled upon application made within thirty days after introduction of such evidence * * *; (iv) to cross-examine (in person or by counsel) such adverse witness" (Section 101(s)); and (3) that "[i]f a person is adversely affected, by evidence or testimony given in executive session or by material in the Commission's files or records, and if public release of such evidence, testimony, or material is contemplated, such person shall have prior to public release of such evidence or testimony * * * or any disclosure of or comment upon it by members of the Commission or Commission staff or taking of similar evidence or testimony in a public hearing, the rights heretofore conferred and the right to inspect at least as much of the evidence or testimony of the adverse

witness or material as will be made public or the subject of a public hearing" (Section 101(f)). Thus, the Dies amendments provided virtually the same rights of notice, confrontation, and cross-examination for which plaintiffs have contended in the instant cases.

The following year (1957), several civil rights bills, were introduced in Congress which embodied the substance of H.R. 627 as it had been amended and passed by the House. The principal such bill was S. 83, introduced on January 7, 1957, by Senator Dirksen, then ~~Senator~~ Senate minority whip, and others, ~~who~~ which described the procedures to be followed by the Commission in precisely the same language as that in the Dies amendments to H.R. 627 (see Appendix, *infra*, pp. 63–65). On the other hand, H.R. 6127, the other major civil rights bill, which bore the name of Representative Celler, Chairman of the House Judiciary Committee,[15] incorporated the so-called House "fair play" rules (see Appendix, *infra*, pp. 61–63) as its only provision for regulating the procedures of the Commission. These rules, in contrast to H.R. 627 and S. 83, stated,

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[15] The history of H.R. 6127 is as follows:

H.R. 1151 and H.R. 2145 were introduced by Representative Keating and Celler, respectively, on January 3, 1957, and were considered by Subcommittee No. 5 of the House Judiciary Committee. The subcommittee struck out all the provisions of H.R. 2145, and inserted in their place the provisions of H.R. 1151. The Judiciary Committee then approved the bill with instructions to the chairman to report out a "clean bill", embodying the proposals approved by the committee. This clean bill, bearing the number 6127 and Mr. Celler's name, was introduced March 19, 1957. H. Rept. No. 291, 85th Cong., 1st Sess., pp. 2–3.

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as to notice, merely that the chairman of the Commission must announce the subject of the hearing in an opening statement, but it made no provision for advance notice or disclosure to witnesses, or any other person against whom adverse testimony had been received. Similarly H.R. 6127, with regard to confrontation and cross-examination, provided only that counsel could accompany witnesses to investigative hearings "for the purpose of advising them concerning their constitutional rights." As Judge Wisdom pointed out in his dissent below, this was but another way of saying "that the lawyer (or his client) cannot cross-examine an adverse witness" (L. 262).

Testifying both at the House hearings on various civil rights bills and Senate hearings on S. 83, Attorney General Brownell supported the enactment of the House rules instead of the "restrictive" procedures contained in the Senate bill. During the hearings in the House, the following colloquy took place between Representative Keating and the Attorney General:[16]

> *Mr. Keating* [referring to the procedures required by H.R. 627] * * * They are considerably more restrictive than the rules * * * for conduct of regular congressional committees. If this committee should decide to include a provision for the conduct of hearings held by the Commission which was in general similar to those set up in the rules of the House for the conduct of congressional committees, would you see any objection [to] that?

[16] Hearings before Subcommittee No. 5, House Judiciary Committee, 85th Cong., 1st Sess., p. 593.

> *Mr. Brownell.* I am confident that the caliber of the Commission would be such that you could count on them to give the fairest opportunity to witnesses, to be sure that their legitimate rights are protected. Neverheless [sic], if it is demed [sic] advisable by the Congress to set up a special set of rules for that purpose, I think it is extremely important that everyone join in seeing to it that proper rules of procedure are followed by the Commission. I would have no objection.

Subsequently, on February 14, 1957, Attorney General Brownell stated before a subcommittee of the Senate Judiciary Committee: [17]

> Now there is one other addition to S. 83 that I would like to make special reference to and that is the provision for rules of procedure contained in section 102 on pages 2 to 10 of S. 83. These rules of procedure are considerably more restrictive than those imposed on regular committees of the House and Senate. There is much in them which clearly would be desirable. We have not as yet had any experience with the use of rules such as those proposed here and we cannot predict the extent to which they might be used to obstruct the work of the Commission.
>
> Favoring as I do the imposition of proper rules of procedure upon all governmental committees and commissions which conduct public hearings in order adequately to protect the individuals called before them, I am reluctant to take a

[17] Hearings, Subcommittee on Constitutional Rights, Senate Judiciary Committee, 85th Cong., 1st Sess., pp. 14–15.

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stand opposing the imposition of the rules here involved.

Yet I feel that the task to be given to this Commission is of such great public importance that it would be a mistake to make it the vehicle for experimenting with new rules which may have to be tested out under the courts and this is only a 2-year Commission and you might have to spend those 2 years studying the rules instead of getting at the facts.

Another reason why I think perhaps the substance of these rules should be eliminated from this particular bill is that the caliber of the men whom the President would appoint to the Commission would be such that they could be counted on to give the fairest opportunity to witnesses and protect all of their legitimate rights.

On July 12, 1957, during the debate in the Senate, Senator Talmadge drew to the attention of the Congress that H.R. 6127 did not contain certain procedural protections—some of which are the very same procedural rights for which plaintiffs are now contending (103 Cong. Rec. 11504):

> No provision is made for notification of persons against whom charges are to be made. No provision is made for persons adversely affected by testimony taken by the Commission to be present when they are accused or later to confront and cross-examine their accusers.

Nevertheless, the views of Attorney General Brownell and Representative Keating prevailed. Congress adopted the House rules, provided for in H.R. 6127, in Section 102 of the Act, 42 U.S.C. 1975a (*supra*, pp. 3–6)

(103 Cong. Rec. 9516, 13900, 16478). Thus, Congress specifically rejected statutory requirements embodying the very rights which plaintiffs are claiming; it adopted, instead, a detailed set of procedural provisions which clearly do not provide for pre-hearing notice, confrontation, or cross-examination.

B. The meaning of the procedural provisions of the Act is made apparent in yet another way. Since, as shown above, Section 102 of the Act substantially incorporated the House "fair play" rules,[18] that section was obviously intended to have the same meaning as the equivalent House Rules. As Representative Keating remarked (103 Cong. Rec. 8497):

> *Investigations by the Commission will be bound by rules of procedure modeled after those applicable to congressional committees.* A copy of these rules must be made available to every witness who appears before the Commission. [Emphasis added.]

And, as Representative Celler stated (103 Cong. Rec. 8491):

> *The rules of procedure of the Commission are the same as those which govern the committees of the House.* For example, the chairman is required to make an opening statement as to the subject of the hearing. Witnesses are furnished with a copy of the Commission's rules and may be accompanied by counsel. The chairman is authorized to punish breaches of order by censure and exclusion. Protection is furnished to

[18] For a comparison between the pertinent House rules and Section 102 of the Act, see the Appendix, *infra*, pp. 61–63.

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> witnesses when it appears that a person may be the subject of derogatory information by requiring such evidence to be received in executive session, and affording the person affected the right to appear and testify, and further to submit a request for subpena of additional witnesses. [Emphasis added.]

The legislative history of the House "fair play" rules demonstrates conclusively that Congress, in accord with the procedures historically followed by its investigative committees (see *infra*, pp. 43–51), did not intend to provide a right of confrontation and cross-examination. In 1953, Representative Keating introduced H. Res. 29 (83d Congress), which would have given witnesses before legislative committees a right of cross-examination, limited to one hour unless extended by vote of the committee (Hearings before the Subcommittee on Legislative Procedure of the House Committee on Rules, 83d Cong., 2d Sess., p. 7).

Subsequently, Representative Keating expressed doubt as to the wisdom of extending the right of cross-examination to witnesses before the committees and suggested substituting a provision for the submission of written interrogatories (*id.* at p. 13):

> * * * That is in lieu of the right of cross-examination, which is given in House Resolution 29, and I am inclined to think that we have not progressed in this field to the point where we are ready to give the right of cross-examination to the counsel for a person who may have had his name brought into hearings in a manner which adversely affected him, or which he thinks does so.

On February 17, 1954, while the hearings were still pending, Representative Scott, the committee chairman, introduced H. Res. 447 which stated that counsel for witness shall be permitted "to address pertinent questions to other witnesses whose testimony pertains to his client, by written interrogatories submitted to the chairman or by cross-examination, for such length of time that the committee deems reasonable" (*id.* at pp. 249–251).

The Subcommittee on legislative procedure, on March 9, 1954, tentatively adopted H. Res. 447 and submitted it to the full Committee on Rules for suggestions and changes. 101 Cong. Rec. 221. Suggestions continued to be received and considered concerning the resolution, and it was ultimately modified in the form contained in H. Res. 571, introduced on June 1, 1954. 101 Cong. Rec. 219. H. Res. 571 deleted any mention of the right to oral cross-examination (*ibid.*).

Resolution 571, which carried the approval of the subcommittee, was introduced into the 84th Congress as H. Res. 61, when the subcommittee made its report to Congress. 101 Cong. Rec. 218. Concerning the right to cross-examination, the subcommittee commented (101 Cong. Rec. 221):

> The right of cross-examination: Opinions are widely divided on whether counsel for a witness should ever be permitted to cross-examine his client or other witnesses directly. After carefully considering the alternatives, your subcommittee decided to recommend the use of written interrogatories only. In appropriate circumstances, the committee could still permit limited cross-examination if it wishes to do so;

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thus the omission merely serves to discourage potential abuses by contentious advocates.

Thus, the proposals, which originated with a provision for the right of cross-examination, finally came out of committee with only the right to submit written interrogatories to the committee to be asked by the committee staff.

On February 22, 1955, Representative Doyle introduced H. Res. 151 which provided only that witnesses should have the right to have counsel present to advise them of their constitutional rights. 101 Cong. Rec. 1912. After a brief hearing, the Committee on Rules reported H. Res. 151 to the House with the recommendation that it be passed. H. Rept. No. 159, 84th Cong., 1st Sess.

In the debate on the floor of the House, Representative Scott asked that H. Res. 447 or H. Res. 61 (*supra*, p. 30) be substituted for H. Res. 151 and had them reprinted in the Congressional Record. 101 Cong. Rec. 3574–3575. He contended that one of the major defects of H. Res. 151 was that it failed to provide a right of cross-examination. 101 Cong. Rec. 3573. But the House rejected this view, and passed H. Res. 151 without any provision for written interrogatories or cross-examination. 101 Cong. Rec. 3585.

Since the passage of the "fair play" rules, House committees have not interpreted them as requiring confrontation and cross-examination, and these privileges have rarely been provided.[19] And, similarly,

[19] On the basis of replies from fifteen House committees, it was stated in 1957 that House committees recognize no right to oral cross-examination. 45 Calif. L. Rev. 347, 348, note 10, 351. And the rules of the Committee on Un-American Activities explicitly deny any right to cross-examination (*id.* at p. 352).

such committees have not considered themselves bound, under the House rules, to furnish witnesses prior to hearing with the contents of allegations made against them. In sum, as Judge Wisdom emphasized (L. 263):

> The House "Fair Play Rules" were drawn for the conduct of congressional investigating committees. They were the indirect product of innumerable legal articles, judicial dicta, and editorials. They were the direct product of careful study. It is safe to say that when the House "Fair Play Rules" were adopted as Section 102 of the Civil Rights Act of 1957 every member of the House and Senate regarded that action as an explicit declaration that Congress affirmatively rejected rules extending to witnesses the rights of notice, confrontation, and cross-examination; that, instead, Congress authorized and directed the Civil Rights Commission to follow its more limited "Fair Play Rules".

II

THE COMMISSION'S PROCEDURES AS TO NOTICE, CONFRONTATION, AND CROSS-EXAMINATION ARE CONSTITUTIONALLY VALID

Because the district court decided that the procedures of the Commission as to notice, confrontation, and cross-examination were not authorized by the Act, it did not reach the question of the constitutionality of these procedures.[30] Nevertheless, the court's views on

[30] The plaintiffs in *Larche* also argued that the Civil Rights Act of 1957 was unconstitutional because it is not appropriate

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constitutionality, which we believe were manifestly erroneous, constituted the basic premise of the reasoning which led to its decision. The court concluded that the procedures lacked statutory authorization because it believed that the validity of these procedures raised "a serious constitutional question" and, therefore, under this Court's decision in *Greene* v. *McElroy*, 360 U.S. 474, express statutory authorization must be found.

We submit that the issue here does not fall within "the area of questionable constitutionality" which would justify reliance on the *Greene* decision (360 U.S. at 506). We may note, initially, that the opinion in the *Greene* case expressly left undecided the contention that persons whose rights are "adjudicated" in administrative proceedings have a constitutional right of confrontation and cross-examination (360 U.S. at 508). No court, however, has ever held that a governmental body engaged in a purely *investigatory* proceeding is required to follow the procedures which the district court imposed upon the Commission in this case. The whole history of the practices of investigatory bodies, and all relevant judicial precedents, show that these rights have never been recognized in investigatory proceedings, such as those which the Commission has here been enjoined from conducting.

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legislation under Article I of the Constitution and the Fourteenth and Fifteenth Amendments. The court below rejected this contention (I. 247–250).

A. THE INVESTIGATIVE ROLE OF THE COMMISSION

Section 104 of the Civil Rights Act of 1957, 42 U.S.C. 1975c, explicitly describes the duties and functions of the Commission as that of an investigative body:

> § 1975c. Duties; reports; termination
>
> (a) The Commission shall—
>
> (1) *investigate allegations* in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin; which writing, under oath or affirmation, shall set forth the facts upon which such belief or beliefs are based;
>
> (2) *study and collect information* concerning legal developments constituting a denial of equal protection of the laws under the Constitution; and
>
> (3) *appraise the laws and policies* of the Federal Government with respect to equal protection of the laws under the Constitution.
>
> (b) The Commission shall *submit interim reports to the President and to the Congress* at such times as either the Commission or the President shall deem desirable, and shall *submit to the President and to the Congress a final and comprehensive report* of its activities, findings, and recommendations not later than two years from September 9, 1957.[21]

[21] On September 28, 1959, Congress extended the full limit for the submission of the Commission's report for two years. P.L. 86-383, 73 Stat. 724.

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(c) Sixty days after the submission of its final *report and recommendations* the Commission shall cease to exist. [Emphasis added.]

These duties are also the limits of the Commission's powers since it has no powers other than to carry out its statutory duties by means of hearings and investigations.

It is apparent from the language of the statute that all the functions of the Commission are directed toward the preparation of reports of legislative recommendations and of facts upon which legislative recommendations might be based.[22] Specifically, the Commission has no duties—or powers—of an adjudicatory nature. It does not hold trials. It is neither a prosecutor nor a judge. It does not "decide" cases; it does not determine rights or liabilities. It cannot impose sanctions, indict, or punish; it cannot deprive anyone of his liberty or property; it cannot either directly, or, as was found in *Greene* v. *McElroy*, indirectly, "deprive [anyone] of his job" (360 U.S. at 508. In short, the Commission has taken, and can take, no action which can determine or affect the legal rights of the plaintiffs in these cases. The most that the Commission could do would be to report its findings to the President and Congress—and the nature of

[22] The legislative history demonstrates that the Act was intended by Congress to create "a fact finding and investigatory body." H. Rept. No. 291, 85th Cong., 1st Sess., p. 8. Similarly, Representative Keating, one of the authors of the Act, stated that "[t]he Commission is empowered to study and investigate. It will not have power to prosecute * * *." 103 Cong. Rec. 8497.

those findings is completely conjectural in regard to a proceeding which has been brought to a halt before a single witness can be heard.

Nonetheless, despite the investigatory nature of the Commission's proceedings, the district court found that the hearings would subject plaintiffs to "public opprobrium and scorn", "the distinct likelihood of losing their jobs", and the possibility of criminal prosecution (L. 252).[23] The court's characterization of the present or future effect of the scheduled hearing on the plaintiffs is, necessarily, in the realm of speculation.[24] To be sure, such consequences may, and fre-

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[23] The district court stated in *Larche* that the registrars were being investigated for conduct violating both federal and state law (L. 252). Apparently, what the court meant was that, if the registrars were found to have, under color of law, wilfully deprived any person of any rights, privileges, or immunities protected by the Constitution or federal law in violation of 18 U.S.C. 242, they would also have violated the state statute (LSA-R.S. 14: 134) which prohibits a public officer from intentionally failing or refusing to perform his duty, or intentionally performing his duty in an unlawful manner. See also, as to *Slawson*, footnote 11, p. 14, *supra*.

[24] Mr. Justice Cardozo's dissent in *Jones* v. *Securities & Exchange Commission*, 298 U.S. 1, 33—subsequently cited with approval by the Court in *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186, 217, 203, note 30—is, perhaps, also apt here:

"* * * A commission which is without coercive powers, which cannot arrest or amerce or imprison though a crime has been uncovered, or even punish for contempt, but can only inquire and report, the propriety of every question in the course of the inquiry being subject to the supervision of the ordinary courts of justice, is likened with denunciatory fervor to the Star Chamber of the Stuarts. Historians may find hyperbole in the sanguinary simile."

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quently do, result from purely investigatory proceedings. But, we submit, the fact that such incidental consequences can, or do, flow from an investigatory proceeding does not convert the fact-finder into an adjudicatory body. The crucial question is whether the proceeding is an investigation or a trial. This view is fully supported by the decisions of this Court which have refused to impose on investigatory proceedings the same procedures as are required for adjudicatory actions, even when serious economic or criminal consequences are at least as likely to result as in the instant case. See *infra*, pp. 38–40. Cf. *McGrain* v. *Daugherty*, 273 U.S. 135, holding that the duty of a witness to appear before a legislative fact-finding body cannot be avoided merely because his testimony might subject him to criminal prosecution.

B. THE PROCEDURES HISTORICALLY FOLLOWED, AND JUDICIALLY UPHELD, IN INVESTIGATORY PROCEEDINGS

The Commission's lack of power to adjudicate any of the plaintiffs' legal rights is crucial in determining what procedures are constitutionally required in hearings before it. Historically, notice, confrontation, and cross-examination have rarely been afforded witnesses before investigating bodies—whether grand juries, legislative committees, or executive fact-finding agencies—and when these procedures have been afforded, they have been regarded as a matter of grace and not of right. Moreover, this Court has upheld the power of such investigative bodies to hold hearings in which

these procedures, which would have been essential in an adjudicatory proceeding, have not been provided.[25]

Norwegian Nitrogen Products Co. v. *United States*, 288 U.S. 294, involved almost precisely the same contention as plaintiffs make here concerning disclosure of the contents of allegations made to the Civil Rights Commission. There, the Tariff Commission refused to reveal to an interested party in one of its proceedings both information furnished by another party and that discovered by the Commission's investigators. The Court, in upholding the Commission's action, stated, in an opinion by Mr. Justice Cardozo, that (*id.* at 318):

> The Tariff Commission advises; these others ordain. There is indeed this common bond that all alike are instruments in a governmental process which according to the accepted classification is legislative, not judicial * * *. Whatever the appropriate label, the kind of order that emerges from a hearing before a body with power to ordain is one that impinges upon legal rights in a very different way from the report of a commission which merely investigates and advises. The traditionary forms

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[25] In numerous cases involving procedures different from those in issue here, the courts have emphasized the distinction between an adjudicatory proceeding, in which additional safeguards are required, and investigatory proceedings. See, *e.g.*, *United States* v. *Los Angeles R.R.*, 273 U.S. 299, 310; *Gonzales* v. *United States*, 348 U.S. 407, 412, note 4; *Interstate Commerce Commission* v. *Baird*, 194 U.S. 25, 43–44; *Bowles* v. *Baer*, 142 F. 2d 787, 788–789 (C.A. 7); *Genecov* v. *Federal Petroleum Board*, 146 F. 2d 596, 597 (C.A. 5), certiorari denied, 324 U.S. 865.

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> of hearing appropriate to the one body are unknown to the other. What issues from the Tariff Commission as a report and recommendation to the President, may be accepted, modified, or rejected. If it happens to be accepted, it does not bear fruit in anything that trenches upon legal rights.

And in *In re Groban,* 352 U.S. 330, 332, the Court stated:

> Prosecution of an individual differs widely from administrative investigation of incidents damaging to the economy or dangerous to the public. The proceeding before the Fire Marshal was not a criminal trial, nor was it an administrative proceeding that would in any way adjudicate appellants' responsibilities for the fire. It was a proceeding solely to elicit facts relating to the causes and circumstances of the fire.

The Court therefore concluded that the witness was not constitutionally entitled to the assistance of counsel at the hearing. Similarly, in *Anonymous* v. *Baker,* 360 U.S. 287, the Court, relying on *Groban,* held that a witness testifying in an investigation of unethical practices of attorneys conducted by a state judge has no constitutional right to have counsel present in the hearing room. Since *Groban* and *Baker* decided that witnesses who appear before investigatory bodies considering possible criminal violations have no constitutional right to have counsel with them, it is *a fortiori* that such witnesses likewise had no right of cross-examination. It is difficult to imagine that witnesses may have a constitutional right of cross-examination

while not having the right to counsel which would make the former right effective.[26]

1. *Judicial Proceedings—Grand Juries.* Even in judicial proceedings involving adjudications affecting the basic rights of life and liberty, notice, confrontation, and cross-examination are not automatically afforded at every stage. Thus, in *Williams* v. *New York,* 337 U.S. 241, this Court upheld the imposition of the death sentence, based in part on information given the sentencing judge not known to the defendant and concerning which he had no opportunity to confront and cross-examine the witnesses who had provided it. Moreover, the pre-hearing notice of the contents and sources of allegations made against them—which plaintiffs claim is their constitutional right—is not even provided on the issue of guilt or innocence in Federal criminal prosecutions. Criminal defendants have but a limited right of pre-trial discovery (Rules 16 and 17, F.R. of Crim. P.; cf. *Bowman Dairy Company* v. *United States,* 341 U.S. 214, 221), and are not normally entitled to pre-trial disclosure of the identity of informants and of statements given by them to the government. 18 U.S.C. 3500; *Palermo* v. *United States,* 360 U.S. 343. A list of prosecution witnesses is available before trial as of right only in capital cases. 18 U.S.C. 3432.

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[26] On the other hand, it would not be illogical to allow counsel to be present, while denying the right to cross-examination—the very practice followed by the Commission and many other investigatory bodies. Thus, the dissents in *Groban* and *Baker,* in contending that there is a constitutional right to counsel in investigatory hearings, are not inconsistent with our position in this case.

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Like the Commission, the grand jury is an investigatory body. A witness appearing before a grand jury, particularly if he is a suspect, may obviously be drastically affected by its determinations. If indicted, he may suffer real damage to his reputation and otherwise. Yet a witness before a grand jury has never been thought to have the right to be furnished with notice of the contents of allegations made against him or the names of persons making such allegations. The secrecy of grand jury proceedings has been zealously guarded throughout our history (see, most recently, *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395), and a witness has no right either to interfere with that secrecy or to refuse to testify if the nature of the allegations against him is not disclosed.

Similarly, there is no right of witnesses before grand juries to confront and cross-examine other witnesses. *United States* v. *Scully,* 225 F. 2d 113, 116 (C.A. 2), certiorari denied, 350 U.S. 897. Such a right would seriously interfere not only with the secrecy of the proceedings, but with the historic informality of grand jury procedure necessary for it to function effectively. See *Costello* v. *United States,* 350 U.S. 359, 362–364. Indeed, a witness has been held not to have the right to have counsel present in the grand jury room, even when he is a potential defendant. See *United States* v. *Scully, supra.*

The general absence of safeguards for witnesses appearing before grand juries has been accepted without serious question, doubtless because the grand jury merely investigates and reports. Another body, a court of law, in which the accused is given the full

panoply of procedural protections, must adjudicate before his life, liberty, or property can be taken. Viewed in this light, the parallel between grand juries and investigatory legislative and administrative bodies is clear, and has repeatedly been recognized by the courts. *Oklahoma Press Pub. Co.* v. *Walling, supra,* 327 U.S. at 216; *In re Groban, supra,* 352 U.S. at 333; *Genecov* v. *Federal Petroleum Board, supra,* 146 F. 2d at 597; *Bowles* v. *Baer, supra,* 142 F. 2d at 788–789; *In re Securities and Exchange Commission,* 84 F. 2d 316 (C.A. 2); *Boehm* v. *United States,* 123 F. 2d 791 (C.A. 8).

2. *Legislative committees.* The history of congressional investigations is particularly significant since the Civil Rights Act of 1957 gives the Commission the duty of appraising "the laws and policies of the Federal Government with respect to equal protection of the laws" and reporting on this appraisal to Congress (42 U.S.C. 1975c). Similarly, Representative Keating, an author of the Civil Rights Act (see note 15, *supra,* p. 24), stated that "[t]he purpose of the Commission is primarily to determine whether there is need for further legislation in the field of civil rights" and that therefore the Commission would use the rules of procedure followed by congressional committees (103 Cong. Rec. 8497). Thus, the Commission has a function paralleling that of an investigating committee of Congress.

Congress has throughout its history held to the view that judicial procedures are not necessarily applicable to investigations of its committees. For ex-

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ample, in 1808, a Senate committee rejected a witness' claims to various procedural rights, which were made, the committee said, "as if the committee had been a circuit court of the United States." Annals of Congress, 10th Cong., 1st Sess., p. 56 (see *infra*, pp. 45–46). Similarly, in 1878, the Senate Committee on Privileges and Elections, investigating an accusation of election fraud, refused to follow a suggestion that the Committee observe, as far as possible, "the rules which obtain in courts of justice". S. Rept. No. 540, 45th Cong., 2d Sess., p. III.[27]

a. More specifically, the history of congressional investigations shows that witnesses before congressional committees have rarely been given the opportunity to confront and cross-examine witnesses making allegations against them. See American Bar Association, Special Committee on Individual Rights as Affected by National Security, Appendix to Report on Congressional Investigations (1954), pp. 67–68. Sometimes, however, witnesses have been allowed to submit interrogatories to the committee. Thus, it is clear that such opportunity for questioning adverse witnesses as has been afforded has been provided, not as a matter of right, but of grace on the terms deemed appropriate by Congress.

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[27] See Liacos, *Rights of Witnesses Before Congressional Committees*, 33 B.U.L. Rev. 337, 359, 360; Carr, *The House Committee on Un-American Activities* (1952), p. 463; Dimock, *Congressional Investigating Committees* (1929), p. 153; Eberling, *Congressional Investigations* (1928), pp. 283, 390; McGeary, *The Developments of Congressional Investigative Power* (1940), p. 80; Kauper, *Address to Annual Conference of the Judges of the Sixth Circuit*, 27 Ohio Bar, pp. 607, 616, 620.

The following are among the many instances in which the right of cross-examination has either been expressly refused or has not been provided (see also A.B.A. Report, *supra*, pp. 73–91).

In 1796, the House of Representatives amended and adopted a report of its Committee of Privileges, which had been instructed to report on a mode of proceeding in the cases of Robert Randall and Charles Whitney, both accused of bribing House members. After debate on the question whether cross-examination should be allowed, the report, as amended, stated that

> * * * no question shall be put to any member on the part of the prisoner, by way of cross-examination, except leave be first given by the House; and every such question shall be put by the Speaker * * *.

Annals of Congress, 4th Cong., 1st Sess., p. 195.

In 1800, a Senate Committee of Privileges was appointed to prepare a form of proceedings to govern an investigation of William Duane, a newspaper editor who had been accused of publishing articles defaming the Senate. The report of the Committee as submitted by the committee, and amended and adopted by the Senate, made no provision for confrontation or cross-examination. Annals of Congress, 6th Cong., 1st Sess., p. 117. The Senate rejected a motion to permit Duane "to have assistance of counsel for his defence," but allowed him to be heard through counsel "in denial of any facts charged against [him] or in

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excuse and extenuation of his offence" (*id.* at pp. 118, 119).[28]

In 1807, a special committee of the Senate, under the chairmanship of John Quincy Adams, was appointed to inquire whether Senator John Smith of Ohio, who had been indicted for treason as an alleged accomplice of Aaron Burr, "should be permitted any longer to have a seat" in the Senate. Annals of Congress, 10th Cong., 1st Sess., p. 55. The Committee proceeded to collect evidence most of which, as Smith complained (*id.* at 66) and Senator Adams confirmed (*id.* at 74), was either taken *ex parte* or without allowing Smith to interrogate adverse witnesses. Before the committee, Senator Smith "claimed, as a right, to be heard in his defence by counsel, to have compulsory process for witnesses, and to be confronted with his accusers, as if the committee had been a circuit court of the United States" (*id.* at 56). The Committee's report, in rejecting these claims, pointed out that the Committee was a fact-finding body without power to adjudicate. Thus, the Committee emphasized that its function was "to report * * * the facts relating to the conduct of Mr. Smith", that "the authority of the Committee extends only to proposal, and not to decision", that the committee members "have never conceived themselves vested with authority to try Mr. Smith", and that "it is before the Sen-

[28] Duane protested that he found himself "deprived of all professional assistance, under the restrictions which the Senate have thought fit to adopt", and refused to appear. Annals of Congress, 6th Cong., 1st Sess., p. 122.

ate itself that your committee conceived it just and proper that Mr. Smith's defence of himself should be heard" (*id.* at 56).

Subsequently, during the proceeding before the Senate as a whole, Smith's counsel was permitted to submit written interrogatories to be asked by the President of the Senate of one of the witnesses who had testified adversely against him before the committee (*id.* at 89). Smith, however, never received an opportunity to cross-examine his other accusers, whose depositions were nevertheless admitted before the Senate, causing Smith's counsel to protest strongly the denial of the opportunity to confront and cross-examine his accusers (*id.* at 212, 213).

During the Civil War, the Joint Committee on the Conduct of the Civil War conducted its hearings without affording witnesses counsel or any opportunity for cross-examination. Botterud, *The Joint Committee on the Conduct of the Civil War* (M.A. thesis, Georgetown University, 1949), p. 41.

In 1908, a House committee appointed to investigate charges of corrupt practices by the Electric Boat Company of New Jersey and certain members of the House, adopted a resolution permitting submission of written interrogatories, to be asked witnesses by the committee chairman in his discretion. The resolution provided (H. Rept. No. 1727, 60th Cong., 1st Sess., p. 11):

> *Resolved,* That Hon. George L. Lilley, the Electric Boat Company, and such other parties affected by the investigation as may desire to do so, may be accompanied by and consult with

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> counsel in all public hearings of the committee; and that in view of these circumstances *and in accordance with the well-established precedents of both Houses of Congress* for insuring the orderly conduct of such investigation, *the examination of all witnesses shall be conducted by a member of the committee* to be designated for that purpose from time to time by the chairman; and that *such questions or course of examination as parties interested, or their counsel, may desire shall be submitted in writing to the committee.* [Emphasis added.]

A special committee selected by the House in 1911 to investigate violations of the Sherman Antitrust Act adopted the following rule of procedure:

> Counsel may attend witnesses summoned before this committee, but may not participate in the proceedings, either by way of examination or argument, *except upon permission given by the committee,* from time to time, as the occasion arises. [Emphasis added.]

Cannon's Precedents of the House of Representatives, p. 530.

In the investigation of lobbying, conducted in 1935 and 1936 by a special Senate Committee (79 Cong. Rec. 12770), no cross-examination was afforded. Hearings Before a Special Senate Committee to Investigate Lobbying Activities, 74th Cong., 1st and 2d Sess., p. 1469; McGeary, *The Developments of Congressional Investigative Power* (1940), p. 81. And in 1945 and 1946, submission of written interrogatories by interested parties was invited by the Joint Committee on the Investigation of the Pearl Harbor

Attack. Ford, *The Lawyer and The Congressional Investigation,* 21 So. Cal. L. Rev. 249.[29]

As shown above (*supra,* pp. 29–31), while the House of Representatives was considering the adoption of uniform rules between 1953 and 1955, proposals to permit cross-examination were discussed and expressly rejected. At the same time, the Senate was also considering uniform rules, which, however, were never adopted. An analysis of the rules of procedure of various congressional committees[30] was read into the record of these hearings on the proposed Senate rules. It showed that the House Ways and Means Internal Revenue Subcommittee and the Senate Committee on Government Operations permitted submission of written interrogatories by a person under investigation when a majority of the committee approved; that the House Armed Services Defense Activities Subcommittee permitted oral cross-examination with the approval of the majority of the subcommittee; and five other committees of the House and Senate did not provide in their rules for any type of cross-examination. Hearings, Subcommittee on Rules of the Senate Committee on Rules and Administration on S. Res. 65, 146, 223, 249, 253, 256, S. Con. Res. 11 and 86, 83d Cong., 2d Sess., Pt. 3, pp. 141–142.

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[29] Ford, writing in 1948, stated (p. 243):

"[O]n rare occasions, Congressional Committees have allowed cross-examination of witnesses by attorneys for interested parties. Standard practice is otherwise, however. Committee counsel generally invite the submission of questions in writing by the attorneys for interested parties."

[30] The analysis was prepared by Will Maslow, General Counsel of the American Jewish Congress.

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During these same hearings, Senator Tydings, who had served in 1950 as chairman of a subcommittee of the Senate Committee on Foreign Relations, testified that cross-examination had not been afforded in hearings before his committee (*id.* at p. 374). Senator Brewster indicated that the Truman War Investigatting Committee allowed submission of written interrogatories, but "necessarily reserved full discretion as to the character and duration of the questioning" (*id.* at p. 345) and that the joint committee of the Senate investigating the removal of General MacArthur did not allow any cross-examination (*id.* at p. 344). In 1955, the Senate Committee on Rules and Administration issued a report, containing proposed uniform rules for the conduct of Senate investigations, which stated (S. Rept. No. 2, 84th Cong., 1st Sess., p. 20):

> The practice of permitting persons not members of the Committee or its staff to participate in interrogation is by no means widespread, and has been limited to administrative assistants of Senators who are committee members.

The present practice of congressional committees is likewise to deny confrontation and cross-examination as of right. House committees have interpreted the 1955 House "fair play" rules as not providing a right of confrontation and cross-examination (see note 19, *supra*, p. 31). The Internal Security Subcommittee of the Senate Committee on the Judiciary provides by rule that "Interrogation of witnesses at subcommittee hearings shall be conducted on behalf of the subcommittee by Members and authorized staff

personnel only." Rule 9, Resolutions and Rules Adopted by the Internal Security Subcommittee of the Committee on the Judiciary of the United States Senate (adopted February 7, 1955). Similarly, the Select Committee on Improper Activities in the Labor or Management Field (the so-called McClellan Committee) allows the submission of written interrogatories by a person who is the subject of an investigation in public hearings. With the consent of a majority of the members of the committee, the questions in the interrogatories are asked of the witness by the Chairman, a member of the committee, or by committee counsel. Rule 11, Rules of Procedure, Senate Select Committee on Improper Activities in the Labor or Management Field (adopted February 5, 1957); accord, Rule 17, Rules of Procedure Governing Investigations of the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration (adopted August 21, 1958).

Congressional committees have sometimes permitted confrontation and cross-examination.[21] Generally,

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[21] In 1792, for example, cross-examination was afforded to witnesses in the hearings conducted by a select committee appointed to inquire into the failure of the expedition commanded by General St. Clair. See St. Clair, *A Narrative of the Manner in Which the Campaign Against the Indians Was Conducted in the Year 1791 Under the Command of Major General St. Clair* (Phila., 1812). And, in 1924, witnesses before the Brookhart-Wheeler Committee investigating the Department of Justice were cross-examined by counsel representing Attorney General Harry Daugherty. Hearings before the Select Committee on Investigation of the Attorney General under S. Res. 157, 68th Cong., 1st Sess., pp. 6, 233. For other examples see Taylor, *Grand Inquest* (1955), pp. 243–244, 332, notes 6, 7; A.B.A. Report *supra*, pp. 68–73.

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however, witnesses have, at most, been allowed to submit written interrogatories. Thus, the history summarized above, while it does not purport to be complete, demonstrates that Congress has not regarded confrontation and cross-examination as constitutionally required.

b. While there is considerably less evidence of congressional practice concerning the contents and source of allegations made against a witness, we submit that this reflects general understanding that a witness had no possible right to such information.[32] The only evidence that we have found, moreover, supports the conclusion that witnesses before congressional committees have no right to this information.

In 1839, a select committee of Congress, appointed to investigate alleged defalcations among the collectors in the New York Customs House, called upon a customs collector to furnish certain correspondence. The collector questioned the authority of the committee to make the demand upon him, claiming that he had the right to be informed whether the committee or any of its members charged him with being a defaulter. The committee repeated its request for the

[32] See, for example, the following unqualified statement of the rights of witnesses before legislative committees:

"There is no right to counsel, no right to cross-examination of hostile or friendly witnesses, no right to confrontation of witnesses, or accusers, and *no right to be informed of the nature and cause of an accusation.* While certain of these rights have been recognized by some committees, the grant or denial of them today is within committee discretion [emphasis added]." Liacos, *Rights of Witnesses before Congressional Committees*, 33 B. U. L. Rev. 337, 360, 361.

correspondence, and agreed to the following resolution:

> That this committee cannot recognize the authority or right whatever in any collector, receiver, or disburser of the public money to call upon "the committee" or *"any of its members"* to prefer or disavow a *charge* of his *"being a defaulter,"* before such officer sends *"the correspondence"* of his *"office,"* when required under the authority of the House of Representatives *"to send for persons and papers,"* to enable its committee "to inquire into, and make reports of any defalcations among collectors, receivers, and disbursers of the public money *which may now exist"*; nor can this committee or "any of its *members"* tell whether Mr. Hoyt is, or is not, *now* a defaulter, until by examination of the "persons and papers" for which it has sent and will send * * *.

H. Rept. No. 313, 25th Cong., 3rd Sess., pp. 326, 327; Eberling, *Congressional Investigations*, *supra*, p. 143.

3. *Executive Agencies.* As far as we have been able to determine, federal executive agencies, like Congressional committees, have never recognized a constitutional right of witnesses to confrontation and cross-examination in non-adjudicatory proceedings. Moreover, these procedures are often not, in fact, provided. We have been unable to find any solid evidence as to the practice of such agencies in providing witnesses with the contents and sources of allegations against them. In our view, this lack of evidence is the result of general acknowledgment that no such right of notice exists—a right which, as we have

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shown (*supra,* pp. 40, 41), does not exist in advance of trial even in criminal cases.

a. Since the Civil Rights Commission has the duty of reporting on its investigations to the President, the historical practice of presidential commissions is particularly relevant. Such presidential commissions, however, have followed a wide variety of procedures.[33] In many instances, the commissions have held no hearings.[34] Other commissions, with adjudicatory powers, have held trial-like hearings.[35] But as to investigatory commissions, a review of the hearings and reports of various commissions does not reveal any instance of cross-examination, and one example of a commission specifically refusing to allow such a procedure.

In 1941, President Roosevelt appointed the Roberts Commission (with Mr. Justice Owen J. Roberts as chairman) to ascertain the facts relating to the Japanese attack upon Pearl Harbor, and especially to determine whether any derelictions of duty or errors of judgment on the part of the United States Army or Navy personnel had contributed to the enemy success. Exec. Order 8983, Dec. 18, 1941, 6 Fed. Reg. 6569. Such

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[33] It has been said that "[a]ny attempt to say how a presidential commission normally conducts itself is impossible because they have not shown any tendency to follow a set pattern." Marcy, *Presidential Commissions* (1945), p. 97.

[34] *E.g.*, the committee appointed in 1931 to investigate the charges of the Navy League. Marcy, *supra*, p. 90.

[35] *E.g.*, the Commission To Investigate Alleged Frauds on Creek Indians (House Doc. No. 452, 25th Congress, 2d Sess.), which actually settled land claims and accordingly followed a trial-type procedure. See also *Commission for Ascertaining and Settling Private Land Claims in California* (San Francisco, 1852).

interested parties as Admiral Kimmel and General Short, the Navy and Army commanders at Pearl Harbor, were not permitted to hear the testimony of other witnesses, or to have the assistance of counsel. Thus, they were neither informed of the evidence given before the Commission nor given the opportunity to cross-examine witnesses. U.S. News and World Report, April 2, 1954, p. 83.

Generally, Presidential commissions have either had no rules governing their procedure or the rules were so general as to shed no light on the notice and confrontation issues involved here.[36] Thus, the rules of procedure of the Temporary National Economic Committee provided only that in the examination of witnesses, "the rules of evidence shall be observed but liberally construed." Hearings before the Temporary National Economic Committee (Investigation of Concentration of Economic Power), vol. 1, p. 193. And the Report of the Commission appointed by the President to Investigate the Conduct of the War Department in the War with Spain (1899) states (p. 110) that rules of evidence "as applied in legal proceedings" were not adhered to in the investigation, and that considerable latitude was allowed. See, also, Sen. Doc. No. 415, 64th Congress, 1st Sess., Report of Commission on Industrial Relations (1915), p. 20.

Normally, Congress and President have not im-

[36] The two studies of this subject, Marcy, *Presidential Commissions*, and Galloway, *Presidential Commissions* (in *Editorial Research Reports*, May 28, 1931) do not indicate that the issues have ever arisen, nor that rules of procedure covering these subjects have been adopted.

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posed any mandatory procedural rules on the commissions. For example, the Tariff Commission of 1916 was merely directed by statute to conduct certain investigations. 39 Stat. 796. The Roberts Commission appointed by the President and vested with subpoena power by Congress was empowered to prescribe its own rules of procedure. Exec. Order 8983, Dec. 18, 1941, 6 Fed. Reg. 6569; 55 Stat. 853. The statute establishing the Commission on Foreign Economic Policy (Randall Commission) in 1953 gave it authority to hold hearings and take testimony at its discretion. 67 Stat. 473. Thus, as Judge Wisdom noted below, "The inclusion in the body of the statute of mandatory rules of procedure [for the Commission on Civil Rights] is unique in legislation setting up an investigatory commission" (L. 266, note 10).[37]

Thus, presidential commissions have generally been given authority to establish procedures appropriate to their particular functions. Such flexibility is likely to be essential for effectively conducting their frequently broad investigations. Thus, it has been stated as one of the reasons for the success of British commissions: "* * * each commission determines for itself its own procedure: whether to hold its meetings in public, what witnesses to call, and the method to

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[37] During the debate on the 1956 proposed civil rights bill, Representative Celler stated (102 Cong. Rec. 13546):

"None of the commissions that I know of that have been approved and set up by this House, the Hoover Commission and numberless other commissions, have had to work under rules of the type the gentleman from Texas [Rep. Dies; see *supra*, pp. 22–24] now promulgates and wants to graft onto this commission."

pursue in examining them. * * * No hard and fast rule is followed." Davies, *Brains in Government—Commissions to Find the Facts,* in *Forum,* May 1937, pp. 310–315.

b. Regulatory agencies which are vested with power to punish violations of the acts they administer make a sharp distinction between rules governing the conduct of preliminary investigations on informal complaints and those governing the investigation after a formal complaint is filed. Preliminary investigations can result only in formal complaints; subsequent investigations may result in an order—that is, an adjudication—as to which Section 7(c) of the Administrative Procedure Act (5 U.S.C. 1006(c)) gives every party the right of cross-examination. But the Administrative Procedure Act does not govern non-adjudicatory proceedings. And the rules of the regulatory agencies governing preliminary investigations appear to be uniform in making no provision for cross-examination. See, *e.g.,* Food and Drug Administration Regulations under the Federal Caustic Poison Act, 21 CFR § 285.17, and under the Federal Milk Import Act, 21 CFR § 290.52; National Labor Relations Board Regulations Governing Investigations of Unfair Labor Practice Charges, 29 CFR (1958 Supp.) § 101.4; Rules Applicable to Proceedings Before the Commodity Exchange Commission, 17 CFR § 0.53; Department of Agriculture Rules of Practice under the Federal Seed Act, 7 CFR § 201.151, and under the Perishable Commodities Act, 7 CFR § 47.3(b).

The rules of the Federal Trade Commission provide with regard to "[i]nvestigational hearings, as distin-

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guished from hearings in adjudicative proceedings, * * * including inquiries initiated for the purpose of determining whether or not a respondent is complying with an order of the Commission or the manner in which decrees in suits brought by the United States under the antitrust acts are being carried out * * *" (16 CFR (1958 Supp.) § 1.34), that witnesses required to testify or to submit documentary evidence (16 CFR (1958 Supp.) § 1.40):

> * * * may be accompanied and advised by counsel, but counsel may not, as a matter of right, otherwise participate in the investigation.

Similarly, the Rules of Practice of the Atomic Energy Commission distinguish between "formal" and "informal" hearings (10 CFR § 2.708):

> *Hearings, formal and informal*
> Hearings will be either formal or informal. Formal hearings will be held in cases of adjudication, as that term is used in the Administrative Procedure Act, unless the parties otherwise agree, and in such other cases as may specifically be directed. Informal hearings will normally be held for the purposes of obtaining necessary or useful information, and affording participation by interested persons, in the formulation, amendment, or rescission of rules and regulations.

No confrontation or cross-examination is provided for with respect to informal hearings, even though they may assume some of the aspects of formal hearings, *i.e.*, the subpoenaing of witnesses. 10 CFR § 2.720.

The reason for the distinction in procedures of the regulatory agencies between investigatory and adjudi-

catory proceedings seems clear. If a formal complaint, leading to agency action, is filed, the subject of the inquiry will have all the rights attaching to a trial-type hearing; but it is unnecessary to afford such procedures in a proceeding which cannot result in an order determining his rights. The analogy to the present case is clear. If any court proceedings should be commenced against the registrars as the result of information adduced at a Commission hearing, they will have, in such proceedings, full rights of confrontation and cross-examination.

c. State executive agencies with investigatory functions have likewise often operated with procedures which do not give witnesses the right of cross-examination. For example, New York provides by law for the appointment by the Governor, in his discretion, of so-called "Moreland Commissions," charged with investigating state agencies. Laws of New York, 1907, ch. 539, as amended by ch. 131 of the Laws of 1928, Consol. Laws of N.Y., Executive Law, par. 6. In a study of the Moreland Commissions, it has been observed that

> Fortunately, the general practice has been to deny the right to counsel to put questions to their clients or to engage in cross-examination.

Missall, *The Moreland Act: Executive Inquiry in the State of New York* (1946), p. 59.[38]

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[38] The author explains that counsel is not needed to protect constitutional rights because (p. 60):

"* * * Commissioners have no authority to punish. Should a Commissioner, in an extreme situation, make a party appear guilty of illegal behavior by the type of evidence that the Com-

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New York has also established a Code of Fair Procedure for Investigating Agencies, Laws of New York, 1954, ch. 414. Applicable both to legislative and executive investigations, it affords protections to witnesses similar to those that would be afforded by the Commission on Civil Rights. Thus, it provides (Section 73) that "[c]ounsel for any witness who testifies at a public hearing may submit proposed questions to be asked of the witness relevant to the matters upon which the witness has been questioned and the agency shall ask the witness such of the questions as it may deem appropriate to its inquiry" (par. 3).[39]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that jurisdiction of the appeal should be noted

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missioner permits to be presented or as a result of the manner in which he introduces evidence, the criminality would have to be determined in a court of law."

[39] As already noted, p. 40, *supra*, the plaintiffs' claim that the Constitution accords them the right to pre-hearing disclosure of the identity of the complaining witnesses and the contents of their allegations would, if upheld, give them a right which even defendants in a federal criminal trial do not possess. The plaintiffs' contention also fails to take into account the countervailing interests of (1) the complaining witnesses, the disclosure of whose identity in advance of hearing might subject them to various kinds of pressure or intimidation (including possible indictment on criminal charges, cf. Statement, pp. 9–10, *supra*), and (2) the public, which would suffer from any "drying up" of sources of information bearing upon alleged denials of constitutional rights which Congress directed the Commission to investigate. To be sure, where a tribunal is making an adjudication of guilt or innocence of criminal charges, the rights of confrontation and cross-examination at the trial must be respected, regardless of any possible detriment in "drying up" sources of information. But here there is no trial, and no adjudication.

in No. 549 and the petition for certiorari should be granted in No. 550, and that the judgments of the district court should be reversed.

J. LEE RANKIN,
Solicitor General.
JOSEPH M. F. RYAN, JR.,
Acting Assistant Attorney General.
PHILIP ELMAN,
BRUCE J. TERRIS,
Assistants to the Solicitor General.
HAROLD H. GREENE,
ISABEL L. BLAIR,
DAVID RUBIN,
Attorneys.

DECEMBER 1959.

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APPENDIX

RULES OF THE HOUSE OF REPRESENTATIVES

Rule XI (26)

* * *

(i) The chairman at an investigative hearing shall announce in an opening statement the subject of the investigation.

(j) A copy of the committee rules, if any, and paragraph 26 of rule XI of the House of Representatives shall be made available to the witness.

(k) Witnesses at investigative hearings may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights.

(l) The chairman may punish breaches of order and decorum, and of professional ethics on the part of counsel, by censure and exclusion from

PROVISIONS OF THE CIVIL RIGHTS ACT OF 1957 (SECTION 102, 42 U.S.C. 1975a)

(a) The Chairman or one designated by him to act as Chairman at a hearing of the Commission shall announce in an opening statement the subject of the hearing.

(b) A copy of the Commission's rules shall be made available to the witness before the Commission.

(c) Witnesses at the hearings may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights.

(d) The Chairman or Acting Chairman may punish breaches of order and decorum and unprofessional ethics on the part of counsel, by cen-

the hearings; and the committee may cite the offender to the House for contempt.

(m) If the committee determines that evidence or testimony at an investigative hearing may tend to defame, degrade, or incriminate any person, it shall—

(1) receive such evidence or testimony in executive session;

(2) afford such person an opportunity voluntarily to appear as a witness; and

(3) receive and dispose of requests from such person to subpena additional witnesses.

(n) Except as provided in (m), the chairman shall receive and the committee shall dispose of requests to subpena additional witnesses.

(o) No evidence or testimony taken in executive session may be released or used in public sessions without the consent of the committee.

sure and exclusion from the hearings.

(e) If the Commission determines that evidence or testimony at any hearing may tend to defame, degrade, or incriminate any person, it shall (1) receive such evidence or testimony in executive session; (2) afford such person an opportunity voluntarily to appear as a witness; and (3) receive and dispose of requests from such person to subpena additional witnesses.

(f) Except as provided in sections 102 and 105(f) of this Act, the Chairman shall receive and the Commission shall dispose of requests to subpena additional witnesses.

(g) No evidence or testimony taken in executive session may be released or used in public sessions without the consent of the Commission. Whoever releases or uses in

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public sessions without the consent of the Commission evidence or testimony taken in executive session shall be fined not more than $1000, or imprisoned for not more than one year.

(p) In the discretion of the committee, witnesses may submit brief and pertinent sworn statements in writing for inclusion in the record. The committee is the sole judge of the pertinency of testimony and evidence adduced at its hearing.

(h) In the discretion of the Commission, witnesses may submit brief and pertinent sworn statements in writing for inclusion in the record. The Commission is the sole judge of the pertinency of testimony and evidence adduced at its hearings.

(q) Upon payment of the cost thereof, a witness may obtain a transcript copy of his testimony given at a public session or, if given at an executive session, when authorized by the committee.

(i) Upon payment of the cost thereof, a witness may obtain a transcript copy of his testimony given at a public session or, if given at an executive session, when authorized by the Commission.

H.R. 627, 84th Cong., 2d Sess., as amended and as it passed the House, and S. 83, 85th Cong., 1st Sess., provided in part:

Part I. Section 102.

* * * * *

RIGHTS OF PERSONS ADVERSELY AFFECTED BY TESTIMONY

(q) A person shall be considered to be adversely affected by evidence or testimony of a witness if the Commission determines that: (i) the evidence or testimony would constitute libel or slander if not presented before the Commission or (ii) the evidence or testimony alleges crime or misconduct or tends to disgrace or otherwise to expose the person to public contempt, hatred, or scorn.

(r) Insofar as practicable, any person whose activities are the subject of investigation by the Commission, or about whom adverse information is proposed to be presented at a public hearing of the Commission, shall be fully advised by the Commission as to the matters into which the Commission proposes to inquire and the adverse material which is proposed to be presented. Insofar as practicable, all material reflecting adversely on the character or reputation of any individual which is proposed to be presented at a public hearing of the Commission shall be first reviewed in executive session to determine its reliability and probative value and shall not be presented at a public hearing except pursuant to majority vote of the Commission.

(s) If a person is adversely affected by evidence or testimony given in a public hearing, that person shall have the right: (i) to appear and testify or file a sworn statement in his own behalf, (ii) to have the adverse witness recalled upon application made within thirty days after introduction of such evidence or determination of the adverse witness' testimony, (iii) to be represented by counsel as heretofore provided, (iv) to cross-examine (in person or by counsel) such adverse witness, and (v), subject to the discretion of the Commission, to obtain the issuance by the Commission of subpenas for witnesses, documents, and other evidence in his

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defense. Such opportunity for rebuttal shall be afforded promptly and, so far as practicable, such hearing shall be conducted at the same place and under the same circumstances as the hearing at which adverse testimony was presented.

Cross-examination shall be limited to one hour for each witness, unless the Commission by majority vote extends the time for each witness or group of witnesses.

(t) If a person is adversely affected by evidence or testimony given in executive session or by material in the Commission files or records, and if public release of such evidence, testimony, or material is contemplated, such person shall have, prior to the public release of such evidence or testimony or material or any disclosure of or comment upon it by members of the Commission or Commission staff or taking of similar evidence or testimony in a public hearing, the rights heretofore conferred and the right to inspect at least as much of the evidence or testimony of the adverse witness or material as will be made public or the subject of a public hearing.

(u) Any witness (except a member of the press who testifies in his professional capacity) who gives testimony before the Commission in an open hearing which reflects adversely on the character or reputation of another person may be required by the Commission to disclose his sources of information, unless to do so would endanger the national security.

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